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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-875

MYRTLE GREEN BURTON, Individually and in her Capacity as Representative of JAMES EARL GREEN, Deceased, et. al.,

Petitioners,

v.

WILLIAM L. WALLER, Individually and as Governor of the State of Mississippi, et al.,

Respondents.

REPLY MEMORANDUM FOR PETITIONERS

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February 24, 1975.

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The briefs filed in this Court by the State of Mississippi respondents (the State, its highway patrolmen and its Commissioner of Public Safety) and the City of Jackson respondents (the City and its police officers) reconfirm the reasons why this Court should grant certiorari and reverse the judgment of the Court of Appeals:

1. The briefs in opposition to the writ neither acknowledge nor mention the conclusions of the Court of Appeals. The Court found that the officers' firing was "an excessive cumulated use of deadly force" "beyond the physical limits of [any] justifiable response" (502 F. 2d at 1272) which was "uniformly rejected as unacceptable" by all expert law enforcement testimony on

the subject (*id.*) and was the result of "a confused mass reaction during which, as the supervisory officers acknowledged, they lost control of the men under their supervision" (at 1285). The Court's conclusions of respondents' wrongdoing are unassailable; the best proof of their validity is that the respondents advance no contrary view. It is those conclusions, based upon "all reasonable inferences in favor of defendants" (at 1266), which make erroneous the inconsistent result reached by the Court of Appeals: that no person or entity is liable for this wrongdoing.

2. The cornerstone of the defense lies in respondents' continuing to seek refuge in the fact that it is impossible to tell which officer shot which of the petitioners or their decedents because so many officers fired so many shots. The thesis, an abhorrent one, apparently remains that if wrongdoing reaches some overwhelming order of magnitude it becomes not remediable.

3. The irresponsible rhetoric employed in the State's brief is disturbing, to say the least. In telling this Court it should not exercise jurisdiction over this case, the State urges that the "problem" here is "academic" or "episodic" (at 2). When has it ever been "academic" or "episodic" to this Court that black citizens were killed and wounded by state officers, who, in flagrant violation of petitioners' rights, shot up a black women's dormitory at midnight, panning it from top to ground with fire from shotguns, machine guns and rifles?

4. Unable to rebut the conclusions of the Court of Appeals that there was massive wrongdoing by law enforcement officers at Jackson State, respondents engage in a circular exercise of finger-pointing accusations;

each seeks to find someone else responsible for the tragedy. The city police say they were not responsible, suggesting the state police must have caused the deaths and woundings. The state police say they did not do it; they say the killing and wounding must have been done by either four of their fellow highway patrolmen who swore they did not fire, or by the city police, or by "numerous" Federal and county officers (whomever the State respondents are referring to, they were nowhere near Jackson State) and Jackson State security policemen (who were not involved in the shootings) (*see infra* at 4). The State and City argue they are immune from suit; hence, they claim no one is legally responsible for the wilful and wrongful acts of their agents.

5. Using language further demonstrating the State respondents' arrogant and continuing disregard for the rights of black citizens, the State respondents conclude their brief by saying:

> "Upon the facts presented in this case the jury has laid to rest the riots of 1970, therefore, this Court should not exhume them through the office of certiorari." (At 11)

This is callous nonsense. What is at issue here is whether federal courts will provide remedies for the violation of the highest of Federal rights. Those killed and wounded were part of a crowd which, as the Court of Appeals found, was " 'withdrawing from the street area and dispersing' " as the police commander at the scene was directing them to do (502 F. 2d at 1269). There was no need to use any kind of physical force against these people because, according to the police commander, " 'the people were complying with my request' " to

disperse (*id.*).* Petitioners do not ask this Court to "exhume" "the riots of 1970"; what we want reinstated is the rule of Federal constitutional law which says that killings and woundings such as these are intolerable and will not be countenanced in the future.

While the tone and substance of the State respondents' brief are the best answer to it, there are some fundamental errors in it which should be particularly noted and disposed of.

First, the State respondents assert that they should not be liable because "there were many other law enforcement officers present on the night in question who were equipped with firearms and were in a position to and had an opportunity for causing the complained of injuries" (at 6), naming "numerous city, county and federal officers", as well as "campus security officers" (at 4).

—*But:* There were no "federal" or "county" officers anywhere near the Jackson State campus, let alone participating in the shootings. There were Jackson State security officers in the area, but they were not involved. There is no evidence in the record to the contrary, and the State respondents accordingly cite none. That "federal" or "county" officers or security guards may have joined in the shootings is a complete fabrication made up by the State respondents.

Second, the State respondents assert that "individuals other than law enforcement officers were on the campus armed with firearms and firing them" (at 6).

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*Of course, petitioners Green, shot across the street, and Whitehead (and other women shot inside their dormitory) were not part of that crowd; they equally did not sacrifice a constitutional right by being where they were.

—*But:* The evidence is overwhelming that there was no firing at the officers by anyone (Petition, at 11-12). At the most, for purposes of seeking judgment notwithstanding the verdict, we will assume that a jury might have found that one lone "sniper" fired one or two shots at the officers before they opened up with their barrage. Plainly, as the volume, intensity and area covered by the firing demonstrate, the barrage principally originated from the area where the highway patrolmen were located and went well beyond "the physical limits of [any] justifiable response" (at 1272).

*Third, t*he State respondents find some "incongruity" (at 7) in our dismissing with prejudice the action against 24 officers (including four State highway patrolmen) who testified they did not fire. The State respondents suggest that the officers who denied firing, officers who include clients of the attorneys on their brief, might have been responsible for the tragedy.

—*But*: Even if there were wrongful firing by someone else, proof of more wrongful firing—set off by, or causing, still more wrongful firing—would not and could not exculpate the respondents' wrongful firing. In addition while it may be the case that the highway patrolmen who at trial denied firing perjured themselves, we have no way of knowing that.* As the Court of Appeals found, "they were

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*The only way to disprove a lie is by effective cross-examination, and the highway patrol and its counsel frustrated petitioners' ability to do that by, among other things:

(1) Conducting a closed and secret departmental "investigation" of the shooting. That "investigation" was conducted entirely orally with no records kept and no report written (Hearing, Apr. 2, 1971, Tr. at 23-24, Record on Appeal at 378). In fact, counsel for the Patrol flatly stated that they "purposefully made no

dropped as defendants for want of proof" (502 F. 2d at 1265).

The City policemen who testified they did not fire were dismissed with prejudice for the same reason as were the highway patrolmen. In addition to not having proof that any of them was lying, there was additional evidence that almost all the firing came from highway patrolmen, who

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reports" because "[w]e felt as though we would be investigated" and "our fears were borne out" (*id.*).

(2) The highway patrol, unlike the City police and Jackson State students, refused to provide any information to the Federal Bureau of investigation (Tr. 2857-59) and individual patrolmen were instructed not to make statements to anyone (*e.g.*, Tr. 1278, 1351-52). The highway patrol produced weapons for ballistics testing only when they were subpoenaed, and several patrolmen, responding to a subpoena calling for their weapons, deliberately held back the personal weapons they fired at Jackson State.

(3) When it first became apparent during discovery that documents relevant to this litigation had not been preserved by the highway patrol, petitioners moved the District Court for an order requiring such document preservation. The State respondents opposed the motion by taking what their counsel admitted was "an amazing position that [they had] no documents" (Tr. Hearing, Apr. 2, 1971, at 23, Record on Appeal at 378). A series of document preservation orders were entered by the District Court (April 19, 1971; May 14, 1971; August 10, 1971) and the State respondents subsequently produced copies of some, but not all, of the documents demanded (Affidavit of Petitioners' Counsel, Record on Appeal at 761).

(4) Many of the documents sought to be preserved had, however, already been "lost" by the time the orders were entered. These documents had previously been delivered to a Hinds County, Mississippi, grand jury, and the County District Attorney swore he returned them "to a member of the Mississippi Highway Patrol" in the Hinds County Courthouse (Affidavit, Record on Appeal at 545). The patrol claimed it was never able to indentify that patrolman or produce those papers. In another startling display of indifference, counsel for the State respondents attempted an explanation of their "loss":

> "I am not too sure whether [the District Attorney] said a uniformed officer or a member of the highway patrol. It could have been Game and Fish." (Hearing, Aug. 17, 1971, Tr. at 64, Record on Appeal at 1450)

were grouped together in the street in an area contiguous with but distinct from where the city policemen were located. Indeed, that evidence is summarized in the State respondents' brief as follows:

> "The FBI made an exhaustive investigation of the Jackson State shootings and detailed study of the effects of the barrage. 502 F. 2d 1271. The testimony of the FBI agents set forth the results of that investigation and established that the firing originated 'where the MHP patrolmen had been clustered'." (At 5-6)

In short, the Court of Appeals found that 38 highway patrolmen (502 F. 2d at 1265) and 5 City policemen (at 1270, 1273) fired, it found that the other City policemen did not fire (*id.*), nothing in the record supports a rational inference that the firing was committed by anyone in addition to the 43 officers who admitted firing, and if the State respondents know of any contrary proof, particularly any heretofore suppressed by them, they should come forward with it.*

Fourth, the State respondents say they "do not recognize . . . [immunity] as an issue" (at 10), despite the fact that it was "recognized as an issue" by the Court of Appeals and is recognized by the City of Jackson respondents. The State respondents mention the general jury verdict for all defendants in this part of their brief, perhaps meaning to suggest that there is some connection between it and their statement that they do not "recognize" the issue.

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*If an attorney representing the State respondents has reason to believe that one or more of his clients perjured himself, as an officer of this Court he has a duty to disclose that information. American Bar Association Disciplinary Rules 7-102(A)(4) and 7-102(B).

—*But:* Immunity is the only remaining barrier to entering judgment of liability against the State (and the City). The liability of the State and City was premised on the doctrine of respondeat superior, and, with respect to the City, the additional "borrowed servant" rule. The State and City could act only through their agents (the highway patrolmen in the case against the State, the highway patrolmen and City policemen in the case against the City). Since the jury returned a general verdict for all the agents, it returned a general verdict for their employers.

Now, however, the posture of the State and City is very different in light of the conclusions of the Court of Appeals. Viewing the evidence most favorably to all respondents, the Court of Appeals has held (i) the petitioners or their decedents were killed or wounded by agents of the State and City (302 F. 2d at 1264-65, 1271, 1284); (ii) seven highway patrolmen are "guilty of tortious conduct as a matter of law" (*id.* at 1286); and (iii) there was "an excessive cumulated use of deadly force".* Since it is abundantly plain that four of the five petitioners or their decedents were killed or wounded well outside "the physical limits of [any] justifiable response", and since the fifth petitioner, Mrs. Whitehead, was shot inside a women's dormitory where she had every right to be, the only question left in the case against the State and City is whether ancient and, we contend, inapplicable concepts of immunity should cancel the petitioners' Fourteenth Amendment rights and bar the petitioners from recovering damages.

*It is also established that the City had overall command and control of both the City police and the State patrolmen (*id.* at 1267-1269), and thus the factual basis for holding the City liable for the acts of its "borrowed servants", the patrolmen, has been established.

CONCLUSION

For the reasons stated in the opinion of the Court of Appeals, in our Petition for Writ of Certiorari and here—and because the briefs in opposition filed by the State and City respondents fundamentally support our position—this Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit should be granted.

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